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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Shannon M. Phillips, Circuit Court Judge

Appellate Case No. 2024-000371

Jamie T. Nesbitt,.....Appellant,

v.

Cenlar FSB, Amerihome Mortgage Company, LLC, Lakeview Loan Services, LLC
,.....Respondents.

APPELLANT'S INITIAL BRIEF

June 9, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in improperly making factual determinations reserved for the finder of fact in granting summary judgment on Appellants' SC Code Ann. § 29-3-320 cause of action claim?**

II. **Did the trial court err in granting summary judgment and in failing to rule upon Appellants' Rule 59(e) motion for reconsideration on Appellants' Breach of Fiduciary Duty and Negligence claims when Respondent failed to raise those issues in its motion for summary judgment or even at oral argument?**

STATEMENT OF THE CASE

On December 16, 2021, Appellant Jamie Nesbitt ("Nesbitt") brought this action against Respondents Cenlar FSB, AmeriHome Mortgage Company, LLC, Lakeview Loan Services, LLC (Respondents) and Flagstar, FSB asserting claims for an action under SC Code Ann. § 29-3-320, breach of fiduciary duty and negligence. The statutory relief sought was the Respondents be ordered to satisfy a mortgage, the recovery of actual damages, attorney fees, and costs under SC Code Ann. § 29-3-320. On December 8, 2022, a consent order was entered dismissing all claims against Flagstar, FSB.

On September 13, 2023, Respondents filed their motion for summary judgment solely on the basis that Nesbitt had not complied with the statutory condition precedent of tender which would have to required Respondents to satisfy a mortgage and recover statutory damages and attorney fees under SC Code Ann. § 29-3-320.

A hearing was held on November 20, 2023. On November 29, 2023, the trial

court issued an Order granting summary judgment in favor of Respondents. (Order dated November 29, 2023).

Thereafter, on December 8, 2023, Nesbitt filed a Rule 59(e), SCRCP, motion to alter or amend – commonly referred to as a motion for reconsideration. Specifically, Nesbitt argued that reconsideration of that ruling was warranted:

1) because the Court made improper factual conclusions reserved for the finder of fact, including, specifically, whether Nesbitt had tendered full payment in satisfaction of the mortgage at issue;

2) because the Court failed to even address Nesbitt's evidence, including a deposition and two affidavits, which is, *inter alia*, contrary to the court's obligation to view all evidence in a light most favorable to the Plaintiff (Nesbitt);

3) because the Court granted summary judgment on Nesbitt's claims of breach of fiduciary duty and negligence despite Respondents' failure to even raise those issues in its Motion for Summary Judgment or in oral argument at the hearing.

FACTS

According to her Complaint, on August 8, 2019, Nesbitt executed a mortgage on her home, as mortgagee. This mortgage was recorded in the Spartanburg County Register of Deeds on August 9, 2019 in Book 5657, Pages 377 – 387. The Spartanburg County Register of Deeds office records do not reflect that there has ever been an assignment of record of this mortgage to any other entity. (See Compl. ¶¶5-6).

However, since this mortgage was recorded, Respondents have all claimed to have assumed responsibility for servicing this mortgage and/or have accepted

payments from Nesbitt towards the satisfaction of this mortgage from time to time. (See Compl. ¶7).

Some months later, Nesbitt wanted to refinance this mortgage. A loan closing was held on December 2, 2020, to refinance the mortgage. The loan closing was handled by Attorney Timothy M. Ray, Esquire. (See Compl. ¶¶9-11).

Prior to the closing being held, Attorney Ray received what he believed to be a binding payoff letter from Respondent AmeriHome. (See Ray Aff. ¶¶9-11). The letter was dated November 9, 2020, and reflected a payoff amount of $178,774.37. (See Ray Aff. ¶¶9-11).

This letter reflected this payoff was good until December 7, 2020. On December 7, 2020, the payoff amount was tendered IN FULL by wire transfer by Attorney Ray to AmeriHome. (See Ray Dep. p. 37, ¶¶6-13).

The same day, December 7, 2020, the wire transfer was rejected. (See Ray Dep. p. 58, ¶¶11-25.).Nesbitt argues this wire transfer constituted legal tender of the full and final amount due on the mortgage. (See Compl. ¶16).

The same day as the wire was sent, Attorney Ray's assistant contacted both AmeriHome and Cenlar by phone, Attorney Ray's office never received a call back from any Respondent. (See Ray Dep. p. 58, ¶¶11-25.).

Attorney Ray then called both AmeriHome and Cenlar. He was told at that time that the wire transfer was short in funds. He explained that his office had received a payoff letter with the amount stating it was valid until December 7, 2020. Attorney Ray was then told the problem by both would be addressed and a new letter

would be sent with the corrected amount. Such a letter has never been received by Attorney Ray. (See Ray Dep. p. 59).

The whole controversy in this case is because Respondents rejected the wire transfer sent in the amount of $178,774.37 by Attorney Ray. This was the precise amount specified as good until December 7, 2020, in Respondent's binding payoff letter.

Ray acknowledges there was standard language in the payoff letter concerning possible increases and a general recommendation for confirmation of payoff amounts. (See Ray Dep. pp. 31-33.). However, Ray maintained in his deposition that despite having closed many loans, he had never seen a rejection of this kind. (See Ray Dep. p. 33, ¶¶8-24).

According to the deposition of Daniel Anderson, a Cenlar employee, the payoff was rejected by Cenlar because it was short due to a property tax payoff. (See Anderson Aff. p. 4, ¶¶18-24). Anderson claimed that Cenlar made a tax "disbursement" on December 3, 2020, which increased the payoff by $1361.86 to $180,137.83. (See Anderson Aff. p. 4). There is no evidence that Cenlar informed Nesbitt or Ray of this action.

Apparently, Cenlar *did not actually pay the property taxes.* In his affidavit, Ray stated that he paid the Spartanburg County property taxes on this property and attached a copy of his canceled check and check ledger to that effect. (See Ray Aff. pp. 1-2 and Exhibits 1 and 2.).

Ray offered the theory in his deposition, that Cenlar self-described tax "disbursement" was in fact a disbursement to a third-party vendor which would have paid the property taxes for a fee. See Ray Dep. p. 35).

No denial of this theory or evidence to the contrary has been offered. Nor has there been a denial that the third-party vendor failed to return the funds transferred to it.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *accord Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); See also *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990)).

"In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)); *accord Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Hall v. Fedor*, 349 S.C. 169, 173, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing *Young v. South Carolina Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 173-74, 561 S.E.2d at 656. "Because it is a drastic remedy, summary

judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001) (citing *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (1999)).

ARGUMENT

I. THE TRIAL COURT ERRED IN IMPROPERLY MAKING FACTUAL DETERMINATIONS RESERVED FOR THE FINDER OF FACT IN GRANTING SUMMARY JUDGMENT ON NESBITT'S SC CODE ANN. § 29-3-320 CAUSE OF ACTION CLAIM.

Rule 56 of the South Carolina Rules of Civil Procedure requires the circuit court to consider the submitted pleadings, along with depositions, answers to interrogatories, admissions, and affidavits, when ruling on summary judgment.

The Plaintiff submitted two affidavits which bore directly upon the issues of fact and law. The court erred because its orders fail to address Plaintiff's evidence, which is contrary to the court's obligation to view all evidence in the light most favorable to Plaintiff.

The court's order fails to discuss any fact, despite the requirement that the facts and circumstances must be viewed in the light most favorable to the Plaintiff, as she is the non-moving party. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003).

Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be

denied. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003) (holding that summary judgment should be denied even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom); *MacFarlane v. Manly*, 274 S.C. 392, 264 S.E.2d 838 (1980); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 280, 573 S.E.2d 830, 835 (Ct. App. 2002); *Hall v. Fedor*, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002); *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

The issue as to whether tender was made by Nesbitt to trigger the relief afforded by the statute. Respondents claim the tender was insufficient because Respondents paid the Spartanburg County Real Property taxes, this claim was unsubstantiated. Nesbitt presented sworn evidence corroborated by submission of documents that Nesbitt paid those taxes.

Plaintiff presented two Affidavits reflecting that it was the Plaintiff who paid the real property taxes in question and that Defendants had actual or constructive knowledge that the taxes had been paid. The evidence even included canceled checks and registers showing that the taxes were paid by Plaintiff out of closing. (Affidavits of Timothy Ray, Esq., and Crystal Phillips, filed November 12, 2023.) Respondents evidence showed that they did nothing more than send money to a third-party escrow type company with which to pay the taxes and was totally devoid of proof that the

taxes were actually paid to the county authorities by this escrow company or that Respondents were not fully reimbursed after the fact.

Had the order even referenced Nesbitt's evidence, it would have been difficult, if not impossible, to reach the conclusion that summary judgment should have been granted to Respondents. Nesbitt presented much more than the quantum of evidence that would permit a reasonable inference to have been drawn, such that issues of fact would have been created as issues of fact for trial. *Kitchen Planners, LLC v. Friedman,* 440 S.C. 460-61, 892 S.E.2d 297,300 (2023).

Even if the order excluded Plaintiff's evidence because the court disagreed with Nesbitt's analysis and drew different conclusions or inferences, it would still have been error to grant summary judgment to Respondents.

Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Thus, taking the evidence in the light most favorable to Nesbitt there was a genuine issue of material law or fact as to tender within the meaning of the statute.

2. THE TRIAL COURT COMPOUNDED ITS ERROR IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' COMPLAINT WHEN RESPONDENTS' MOTION FOR SUMMARY JUDGMENT DID NOT EVEN MENTION APPELLANT'S SECOND CAUSE OF ACTION FOR BREACH OF FIDCUCIARY DUTY, NOR APPELLANT'S THIRD CAUSE OF ACTION FOR NEGLIGENCE OR AT ORAL ARGUMENT.

The Trial Court granted summary judgment as to Nesbitt's *entire* complaint. This despite the fact that Plaintiff's Notice of Motion and Motion for Summary Judgement discusses only Nesbitt's first cause of action. There are references to the

second and third causes of action in Respondent's Memorandum, but he motion itself makes no reference to them.

"One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor." *Skinner v. Skinner*, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). "Ordinarily, a court may not grant relief beyond the limits or scope of such notice." Id.; see also, *Turbeville v. Floyd*, 341 S.E.2d 651, 288 S.C. 171 (Ct. App. 1986).

However, our Supreme Court has indicated *in dicta* that the Circuit Court may grant a motion for summary judgment on a ground not included in the notice of the motion if the ground is fully argued before the court without objection. *See Salvo v. Hewitt, Coleman & Associates*, 274 S.C. 34, 260 S.E.2d 708 (1979). At oral argument, the issues of the second and third causes of action were not discussed.

CONCLUSION

Based upon the foregoing, Appellant respectfully request the trial court's order granting summary judgment be reversed and the case remanded for trial on the merits for all of Appellants' claims. Additionally, Appellants would ask that the judgment be reversed for any other reason appearing in the record of the case.

June 9, 2024

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